STATE OF MICHIGAN
IN THE SUPREME COURT

DONNA KROON-HARRIS,

Plaintiff-Appellee,

Supreme Court #: 129689

Court of Appeals
Docket No. 261146

vs.

Court of Claims No. 04-78-MK

STATE OF MICHIGAN,

Defendant-Appellant

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BRIEF OF PLAINTIFF-APPELLEE OPPOSING LEAVE TO APPEAL

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Question Presented for Review

Does the Court of Claims have jurisdiction of a complaint alleging that the State of Michigan has breached a contract of insurance by failing to pay benefits to plaintiff under its self-funded Long Term Disability and Income Protection Plan for the State of Michigan Employees?

Plaintiff-Appellee says "Yes."

Defendant-Appellant says "No."

The Court of Claims said "No."

The Court of Appeals said "Yes."

Statement of Proceedings and Facts

Plaintiff-Appellee was employed as a secretary by Defendant-Appellant's Department of Natural Resources. Defendant insured Plaintiff under a self-funded, long-term disability and income protection plan. While so insured, Plaintiff claimed the long term disability (LTD) benefits that the Defendant's plan provided, the Defendant denied the Plaintiff's claim and Plaintiff sued in the Court of Claims alleging that the Defendant's refusal breached a contract of insurance. [Docket Entry No. 6, First Amended Complaint] **It is admitted that Defendant's refusal to pay LTD benefits to Plaintiff was made without an evidentiary hearing and that the Defendant's refusal is not reviewable by any administrative agency of the State of Michigan.** [Docket Entry No. 8, Answer to First Amended Complaint]

Plaintiff sought to depose Kenneth Swisher, Director of Employee Health Management in Defendant's Office of the State Employer. On November 5, 2004, Mr. Swisher failed to appear for his deposition. [Docket Entry No. 14, Deposition of Kenneth Swisher] On November 10, 2004, the Court of Claims entered an order barring discovery pending its ruling on a motion for summary disposition which, at that time, Defendant had not filed. [Docket Entry No. 17, Order Granting Motion for Protective Order] Plaintiff's objection to entry of a protective order received the following response: "THE COURT: Sure. Tell him I put his brief on my head, and I learned by osmosis what to do." [Docket Entry No. 16 Transcript of Proceedings held November 10, 2004].

On January 25, 2005, Defendant filed a second motion for summary disposition[1] claiming under MCR 2.116(C)(4) that the Court of Claims lacked jurisdiction of the subject matter, and under MCR 2.116(C)(8) that plaintiff had failed to state a claim for relief. [Docket Entry No. 25, Defendant's Second Motion for Summary Disposition]

[1] An earlier motion filed by the defendant [Docket Entry No. 4] had been withdrawn.

Defendant supported its motion with the affidavit of Kenneth Swisher. [Docket Entry No. 25, Brief in Support of Defendant's Second Motion for Summary Disposition, Exhibit C]

The Defendant was granted summary disposition on February 16, 2005, upon a ruling that the Court of Claims lacked subject matter jurisdiction. [Docket Entry No. 30, Order of Dismissal] Plaintiff appealed of right, and on July 14, 2005, the Court of Appeals reversed and remanded to the Court of Claims. Defendant's motion for rehearing in the Court of Claims was denied on September 2, 2005.

Discussion

The Court of Claims has jurisdiction of a complaint alleging that the State of Michigan has breached a contract of insurance by failing to pay benefits to plaintiff under its self-funded Long Term Disability and Income Protection Plan for State of Michigan employees.

Defendant relies upon *Studier v MPSERB*, 472 Mich 642; 698 NW2d 350 (2005), where it was held that the Plaintiffs, public school retirees, had failed to overcome a presumption that statutes do not create contractual rights absent an expression of legislative intent to be contractually bound and that MCL 38.1391(1) did not create a contractual entitlement to health care benefits. Here, no statute is implicated. The LTD plan that is the subject of this litigation is offered to both classified and unclassified employees of the State of Michigan through the Office of the State Employer.[2]

The Office of the State Employer was created by Executive Order 1979-5 and was transferred by Executive Order No. 1981-3 from the Department, Management and Budget, to the Department of Civil Service. By these Orders, the Office of the State Employer has no rule-making authority. Defendant's argument that policy decisions are tantamount to rule-making is specious.

Defendant's argument that the decision of the Court of Appeals "undermines the Michigan Civil Service Commission's constitutional authority" and "would effectively dismantle the Commission's administrative policies and procedures for review of denials of employee health care benefit,"[3] is disingenuous. The Civil Service Commission has no authority over decisions by the Office of the State Employer to grant or deny LTD benefits; and there are no administrative policies and procedures for review of those decisions.

[2] The Plan's text can be accesed at http://www.michigan.gov/ose/0,1607,7-143-6012-13917--,00.html
[3] Defendant's Application for Leave to Appeal, at p.28.

Defendant's claims: "Those who are not civil service employees are simply ineligible for the LTD benefit offered to Ms. Kroon-Harris, regardless of their willingness and ability to pay a premium."[4] The claim is false and violates MCR 2.114(C). The LTD plan is expressly offered to the following:

> **ALL FULL TIME CLASSIFIED EMPLOYEES, UNCLASSIFIED EMPLOYEES WHO PARTICIPATE IN A FORMAL SICK LEAVE PLAN AS DESCRIBED FOR CLASSIFIED EMPLOYEES, EMPLOYEES OF THE MICHIGAN COURT SYSTEM AND COUNTY JUVENILE COURT OFFICERS who have an appointment of at least 720 working hours duration are considered to be in the class of employees eligible for coverage under the Plan.**

It is beyond controversy that he State's self-funded, long-term disability and income protection plan is available to employees outside of the classified civil service and the Civil Service Commission has no role in the plan's administration and no authority with respect to decisions by the Office of the State Employer to grant or deny LTD benefits.

Article 6, §28 of the Constitution of 1963 states: "All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as **provided by law.**" [Emphasis added]

In *Preserve the Dunes, Inc. v Department of Environmental Quality*, 471 Mich. 508, 519; 684 N.W.2d 842 (2004), the Michigan Supreme Court identified the laws that generally provide for judicial review of administrative decisions as: "(1) the review process prescribed in the statute applicable to a particular agency; (2) an appeal to circuit court pursuant to the Revised Judicature Act (RJA), MCL 600.631, and Michigan Court Rules 7.104(A), 7.101, and 7.103, or (3) review pursuant to the Administrative Procedures Act (APA), MCL 24.201 et seq."

[4] Defendant's Application for Leave to Appeal, at p.16.

There is no judicial review process prescribed in any statute applicable to the Office of the State Employer. Because the Office of the State Employer is not an "agency" as defined by MCL 24.203(2), the Administrative Procedures Act does not apply. Consequently, defendant has argued that judicial review of a decision of the Office of the State Employer is governed by Section 631 of the Revised Judicature Act, MCL 600.631, which states:

> An appeal shall lie from any order, decision or opinion of any state board, commission, or agency, **authorized under the laws of the state to promulgate rules** from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court.
>
> [Emphasis added]

Because the Office of the State Employer is not authorized to promulgate rules, a jurisdictional requirement for an appeal under Section 631, the Court of Claims erred when it held that plaintiff's claim was cognizable in circuit court by way of an appeal under Section 631. The Court of Appeals correctly held that a claim for benefits from the State of Michigan's self-funded, long-term disability and income protection plan must be brought as an action *ex contractu* in the Court of Claims.

MCL 600.6419(1) confers upon the Court of Claims the exclusive jurisdiction "(a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms or agencies." In *Parkwood v State Housing Dev. Auth.*, 468 Mich. 763, 774; 664 N.W.2d 185 (2003) the Court held:

> In our view, § 6419(1)(a), by its explicit grant of exclusive jurisdiction to the Court of Claims of "all claims and

> demands ... ex contractu and ex delicto" against the state, deprives "by law" the circuit court of jurisdiction over these types of claims. Under the language of M.C.L. § 600.605, § 6419(1)(a) is an instance "where exclusive jurisdiction is given ... by statute to some other court...." Thus, we construe § 6419(4) as maintaining the jurisdiction of the circuit court over those declaratory claims against the state that do not involve contract or tort.

In *Guiles v U of M Board of Regents*, 193 Mich. App. 39; 483 N.W.2d 637 (1992), plaintiff appealed from a Court of Claims grant of summary disposition dismissing his claim for long term disability benefits available through his employment by the defendant. The defendant had argued, and the Court of Claims had ruled, that the denial of benefits was not arbitrary, capricious or in bad faith, and that plaintiff had failed to exhaust his administrative remedies because he did not invoke the defendant's grievance procedure. The Court of Appeals reversed, stating: "The net effect of the court's ruling was to allow defendant to adopt the opinion of its own doctor and thus determine plaintiff's entitlement to benefits in the absence of any procedure for independent review." This was held to be an error, as was the lower court ruling that Plaintiff had failed to exhaust his administrative remedies. "Before a party can be required to exhaust an administrative remedy, the remedy must be available to him." 193 Mich. App. 39, at 47.

Here, the facts are essentially the same, the only difference being that the employer is the State of Michigan, rather than a state university, and the insurance plan administrator is the Office of the State Employer. Here, too, the Defendant has denied Plaintiff's claim for disability benefits in the absence of any procedure for independent review, and there is no administrative remedy available to the Plaintiff. There is no reason to treat decisions made under this plan differently than decisions made by the University of Michigan under its long term disability insurance plan.

Defendant has argued that *Guiles, supra,* does not apply because decisions of the Office of the State Employer are administrative decisions subject to review in the circuit

courts under MCL 600.631. As shown above, MCL 600.631 provides for administrative review of agencies that have rule-making authority. The Office of the State Employer has no rule making authority. More to the point, the Plaintiff's claim, as in *Guiles*, is *ex contractu*. All actions *ex contractu* against the State of Michigan or any of its subdivisions must be brought in the Court of Claims.

Defendant has cited *Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich. 152; 365 NW2d 93 (1984) and *Matulewicz v Governor*, 174 Mich. App. 295; 435 NW2d 785 (1989) for the proposition that classified civil service employees do not have employment contracts. Whether Plaintiff had an employment contract is immaterial. Where an insurer refuses to pay a benefit provided under an employer-sponsored policy or plan of insurance, an employee's claim for that benefit lies against the insurer, and not against the employer. The claim is for enforcement of the insurance contract, not the employment contract. The self-funding of the insurance does not alter the relationship between the insurer and the insured.

The opportunity to enroll in the Defendant's insurance plan is offer to both classified and unclassified employees of the State of Michigan, including employees of the Michigan court system. Once enrolled, the plan's insurance coverage is purchased, in part, by payments made by employees through payroll deductions. Coverage is the promise of income protection in the event of total and permanent disability. The obligation to pay benefits, once incurred, survives the termination of the employment and is a contractual undertaking separate and apart from the employment contract.

Plaintiff's claim for disability benefits is against the Defendant as a self-funded insurer, *ex contractu*. Because those benefits are payable from the State's treasury, the Court of Claims has jurisdiction of this action.

IV. Relief

Leave to Appeal should be denied.

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